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BRIEF FOR THE PUBLIC SERVICE COMMISSION IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1591

WASHINGTON URBAN LEAGUE, INC., ET AL., *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL., *Respondents.*

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

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BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION IN OPPOSITION

OPINIONS BELOW

The decision of the District of Columbia Court of Appeals entered in this case is set forth in Appendix B of the Petition, and that Court's denial of Petitioner's Petition for Rehearing is set forth in Appendix C of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether an appeal from an interlocutory prehearing order of a District of Columbia regulatory agency which merely specifies the issues to be considered in a formal rate case before it is a final and appealable order within the purview of Sections 43-704 and 705, District of Columbia Code, 1967, when, at the time such appeal was taken the case had just commenced to be heard and no final order disposing of the case had been promulgated by such regulatory agency.

STATUTORY PROVISIONS INVOLVED

Sections 43-704 through 710, District of Columbia Code, 1967, with emphasis on Secs. 43-704 and 705.

STATEMENT OF THE CASE

On July 12, 1971 the Potomac Electric Power Company (PEPCO) filed with the Public Service Commission of the District of Columbia (PSC) an application for an increase in its rate of return and for an increase in rates for retail electrical service. The PSC, by Public Notice dated August 11, 1971, denominated PEPCO's application as Formal Case No. 568 giving notice that a prehearing conference would be held thereon on September 23, 1971. Such conference was held and Order No. 5477 (Pet. Ap. A), based on the prehearing conference record was issued on October 12, 1971. Petitioner filed a Motion for Reconsideration of said order on November 1, 1971 which was denied on November 3, 1971 (PEPCO Ap. H). Petitioner on December 30, 1971 filed a Notice of Appeal and Petition of Appeal

in the District of Columbia Court of Appeals. On January 18, 1972 the PSC filed a Motion to Dismiss, with Authorities, in the District of Columbia Court of Appeals. On that same date PEPCO filed a Motion of Intention to Intervene and a Motion to Dismiss in the District of Columbia Court of Appeals in Case No. 6233. On January 21, 1972 The Electric Utility Employees' Union filed in the District of Columbia Court of Appeals a Notice of Intent to Intervene, an answer to the Washington Urban League's petition, and a Motion to Dismiss said petition. On January 21, 1972 the Washington Urban League filed a motion for Stay pending review. On January 28, 1972 the Washington Urban League filed a Response in Opposition to Motions to Dismiss of Respondent and Intervenors. On February 16, 1972 the District of Columbia Court of Appeals filed an order denying the Washington Urban League's Motion for Stay and granting the Motions to Dismiss and thereupon dismissed Case No. 6233.[1] Subsequently, Washington Urban League filed a Petition for Rehearing and Motion for Certification of the Record, and on March 9, 1972 the Court denied such petition and motion.[1] On March 13, 1972 the Washington Urban League filed a Motion for Stay and Temporary Injunction pending the filing of an Application for Writ of Certiorari in the Supreme Court of the United States which was denied by the Court by Order filed March 16, 1972. On May 15, 1972, the Washington Urban League filed its Application for Stay in this Court which was denied on May 19, 1972.

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[1] Petitioner at pages 26-27 of its brief states the District of Columbia Court of Appeals failed to follow the requirements of Sec. 43-705, D.C. Code, 1967, in that there was no hearing, no finding of facts, etc. Petitioner fails to realize that Sec. 43-705 speaks to a hearing concerning a final order of the Commission, and not an interlocutory order, as here. The Court in dismissing obviously agreed with respondents' contention that it had no jurisdiction to hear an appeal from a non-final order.

As to the present posture of Formal Case No. 568, the PSC on May 9, 1972, by Order No. 5509 (PEPCO Ap. J), issued proposed Findings, Opinion, and Order concerning Phase I of Formal Case No. 568, and on that same date, the PSC issued Order No. 5510 in which it dealt with the filing of proposed rate schedules and testimony in support thereof in Phase II of this case, and set June 19, 1972 for oral argument with respect to matters covered in Phase II as well as argument on that same date on exceptions to proposed Phase I order. Argument was made by the parties and final orders in both phases are awaited.

On April 20, 1972 the PSC issued Order No. 5508 (PEPCO Ap. I), which was the start of PSC Formal Case No. 576 "In the Matter of Investigation of the Employment Practices of the Potomac Electric Power Company". In Section 3 of the Ordering paragraph leave was granted to the Washington Urban League to Intervene upon the filing of a notice of intent to do so within ten days from April 20, 1972.

On April 25, 1972 the Washington Urban League filed a letter with the PSC indicating its intent to intervene in Formal Case No. 576. On June 29, 1972 a prehearing conference was held in Formal Case No. 576 at which the Washington Urban League was represented by counsel and participated.

ARGUMENT

Sections 43-704 through 43-710 inclusive, D.C. Code, 1967, as amended, provide a comprehensive and exclusive method for review of final orders and decisions of the Public Service Commission. Section 43-705, D.C. Code, 1967, as amended, provides in pertinent part:

> "The District of Columbia Court of Appeals shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility or any other person or

> corporation *affected by any final order or or decision* of the Commission, *** may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District of Columbia Court of Appeals a petition of appeal setting forth the reasons for such appeal and the relief sought:***'' (Underscoring supplied)

Section 43-705, D.C. Code, 1967, as amended, thus requires that, in order for the District of Columbia Court of Appeals to have jurisdiction of an appeal, the order appealed from be a final order of the Commission in the formal case before it. Clearly, PSC Order No. 5477 is not a final order, but interlocutory only. For an order to be final, within the purview of Section 43-705, it must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process". *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948). Order No. 5477 merely defines the issues to be heard in Phase I of the current PEPCO rate case; admits certain intervenors (including petitioner) as parties to the proceeding; and sets a hearing schedule for Phase I. It in no way, imposes an obligation, denies a right, or fixes some legal relationship upon petitoner as a consummation of the administrative process. In the case of *Port of Boston Marine Terminal Ass'n.* v. *Rederiaktiebolaget Transatlantic* (1970) 400 U.S. 62, 71, the Court succinctly stated the criteria for determining finality as follows:

> " . . . relevant considerations in determining finality are whether the process of administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have

> been determined or legal consequences will flow from the agency action."

Insofar as Formal Case No. 568 is concerned, it is clear nothing has been determined by the prehearing order other than the specific setting forth of issues to be determined in the case. At this point in the case there has been no final determination by the PSC of anything which would affect any party and which would not be subject to review *in toto* under Secs. 43-704 and 705, D.C. Code, 1967, upon issuance by the PSC of a final order in the case. As was pointed out in *Cella* v. *United States* (C.A. 7 - 1953) 208 F.2d 783, cert. denied 347 U.S. 1016, administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.

Our United States Court of Appeals in *City of San Antonio* v. *Civil Aeronautics Board,* 374 F.2d 326, 126 U.S. App. D.C. 112, 115 (1967) was of the view that:

> "No principle of administrative law is more firmly established than that of agency control of its own calendar. Practical problems of calendar administration confront an agency whenever related applications are pending at the same time. Consolidation, scope of the inquiry, and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are of no concern of the courts."

It is quite clear from a reading of the PSC statute, Sec. 43-101 et seq., D.C. Code, 1967, that nowhere therein is there a duty of the PSC to consider employment practices

in the context of a rate hearing. See *United States* v. *Public Utilities Commission of the District of Columbia,* 158 F.2d 533, 81 U.S. App. D.C. 237 (1946), wherein the Court concluded that it did not appear that the data offered in evidence, and rejected, was essential to the development of the substantial facts necessary for a rate order.

The fact that petitioner alleges an error of constitutional proportions in no wise changes the prehearing order in this case from being interlocutory and non-appealable, to being a final and appealable order. See *Chicago Automobile Trade Assn.* v. *Madden,* 328 F.2d 766, 769, wherein the Court enunciated this conclusion:

> "An allegation of unconstitutional harm is insufficient to warrant equitable intervention where pursuit of administrative remedies may render judicial disposition of such issues unnecessary . . . and, the principle which requires administrative finality as a prerequisite to judicial review has particular force where, as here, the interlocutory order sought to be reviewed relates to the agency's casehandling procedures."

It is quite clear from the above that the PSC prehearing order appealed from is interlocutory and not a final order from which an appeal may be taken under Sec. 43-705, D.C. Code, 1967. For this reason it is submitted that the District of Columbia Court of Appeals was correct in granting respondents' motions and dismissing this case.

CONCLUSION

For the reasons set forth above, it is submitted that the Washington Urban League's Petition for a Writ of Certi-

orari to the District of Columbia Court of Appeals should be denied.

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